

STATE OF MICHIGAN
COURT OF APPEALS

TERESA STANLEY,

Plaintiff-Appellee,

v

WYNNESTONE COMMUNITIES
CORPORATION, d/b/a AMURCON
CORPORATION and PHOENIX PLACE
APARTMENTS,

Defendant-Appellant.

UNPUBLISHED
November 17, 2015

No. 325318
Oakland Circuit Court
LC No. 2014-138449-NO

Before: SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM.

Defendant, Wynnestone Communities Corporation, appeals as of right the trial court's order entering default judgment in favor of plaintiff, Teresa Stanley, for \$100,000 on her claim involving a slip and fall injury. We affirm the trial court's denial of Wynnestone's motion to set aside the default, but we reverse its determination of damages and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Stanley fell in the lobby of Wynnestone's apartment building. In January 2014, she filed a complaint alleging that she slipped on a transparent liquid that Wynnestone's agents had created in the common area and injured her back, head, neck, right ankle, and left wrist. In March 2014, Carla Caswell acknowledged receipt of the summons and complaint on behalf of Wynnestone.

In April 2014, Stanley filed a notice for entry of default judgment for Wynnestone's failure to respond to her complaint. The trial court ordered Wynnestone to show cause why it had failed to answer or appear in the case. There is no indication in the lower court record that Wynnestone appeared in response to the trial court's show cause order. Several months later, on October 7, 2014, Stanley filed a motion for entry of a default judgment. Stanley contended that, despite service of the complaint and the notice of default, neither Wynnestone nor anyone acting on Wynnestone's behalf had filed an answer to the complaint in the case.

On November 18, 2014, the trial court held a hearing on the motion. While defense counsel appeared on behalf of Wynnestone, defense counsel had not yet filed an appearance or an answer. Wynnestone contended that it had good cause for failing to respond to Stanley's filings because it sent Stanley's claim to its insurer, Markel Service Incorporated, and Wynnestone believed that Markel was handling the claim. It also contended that it had meritorious defenses, including that Stanley was responsible for her injury and that the danger was open and obvious.

Stanley's counsel acknowledged that it had attempted to work with Wynnestone to settle the case, and Wynnestone consistently stated that "there is insurance, they're trying to get it handled." Counsel for Wynnestone stated that "in August, we again were working between myself, the insurance company and the plaintiff's counsel, trying to come to a resolution." Wynnestone stated that Markel had refused to provide a defense because Wynnestone did not properly notify it of the suit. Wynnestone disputed the propriety of Markel's decision.

At the hearing on the motion, Stanley asked the trial court to award \$400,000 in damages. Stanley did not present any evidence of her medical expenses, but instead testified about the extent of her injuries. The trial court granted the default judgment in the amount of \$100,000. The trial court did not offer Wynnestone the opportunity to cross-examine the witness or argue against the amount of damages.¹

II. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion the trial court's ruling on a motion to set aside a default. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 272; 803 NW2d 151 (2011). The trial court abuses its discretion if its decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The decision to set aside a default is fact-intensive, *Shawl v Spence Bros, Inc*, 280 Mich App 213, 236; 760 NW2d 674 (2008), and the trial court does not abuse its discretion when it makes a reasonable decision about which side to believe when faced with conflicting evidence. *In re Parole of Elias*, 294 Mich App 507, 546; 811 NW2d 541 (2011).

III. ANALYSIS

A. GOOD CAUSE

First, Wynnestone contends that the trial court abused its discretion when it declined to set aside the default judgment. We disagree.

"[A] default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982). Michigan courts generally favor the determination of issues on

¹ The trial court appears to have summarily ended the hearing and rendered a decision while Stanley's counsel was in the middle of direct examination.

their merits unless the trial court properly entered a default judgment. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999).

A party's failure to answer a complaint typically indicates an admission of liability or indifference. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 87; 618 NW2d 66 (2000). However, default is a harsh sanction, and the trial court should carefully consider the circumstances of the case before imposing it. *Id.* at 86. In some circumstances, a party may have the default set aside:

A motion to set aside a default or default judgment, except when grounded on lack of jurisdiction over the defendants, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. [MCR 2.603(D)(1).]

Good cause includes "(1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand." *Shawl*, 280 Mich App at 221 (quotation marks and citations omitted). The negligence of an insurance company acting on behalf of the defendant may constitute a reasonable excuse. See *id.* at 222-223. "[A]n insurer's negligence should not be conclusive on the procedurally nonnegligent defendant." *Id.* at 231. The trial court should consider the totality of the circumstances to determine whether a party has shown cause, including factors such as:

- (1) whether the party completely failed to respond or simply missed the deadline to file;
- (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred;
- (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment;
- (4) whether there was defective process or notice;
- (5) the circumstances behind the failure to file or file timely;
- (6) whether the failure was knowing or intentional;
- (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4);
- (8) whether the default judgment results in an ongoing liability (as with paternity or child support); and
- (9) if an insurer is involved, whether internal policies of the company were followed. [*Shawl*, 280 Mich App at 238.]

In this case, the trial court considered a variety of circumstances before it declined to set aside the default. Wynnestone entirely failed to respond to the suit in this case. A dispute with the insurer was involved, but Stanley's counsel gave Wynnestone time to resolve the issue with its insurer. Wynnestone was represented by counsel at least in August 2014, and it was not solely reliant on the insurer for legal advice. There are no allegations of defective process against Wynnestone. Wynnestone was aware that Stanley had moved for default, but continued to fail to file an answer or even an appearance in the case. Wynnestone waited until the day of the hearing on the motion for default judgment to even address the propriety of default, and at that point, counsel for Wynnestone had not yet even filed an appearance in the case. Importantly, Wynnestone did not respond to Stanley's motion for default judgment, despite having seven months to do so.

On these facts, we conclude that trial court's decision did not violate *Shawl* or fall outside the range of principled outcomes. It is clear from the trial court's reasoning that it determined that Wynnestone was not procedurally nonnegligent. There is no reason to believe that Wynnestone was an innocent defendant that was ambushed by the default judgment. While it is true that Wynnestone was not required to call every day to determine whether the insurer was handling the case, see *Shawl*, 280 Mich App at 231, the facts of this case far exceed *Shawl*. It was reasonable for the trial court to find that Wynnestone itself was procedurally negligent and did not show good cause to set aside the default.

B. DAMAGES

Second, Wynnestone contends that the trial court abused its discretion and denied it an opportunity to be heard regarding the amount of damages. We agree.

To properly preserve an issue, a party must raise the issue before the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). However, this Court will not punish a party for an omission of the trial court. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). We review unpreserved issues for plain error. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). An error is plain if it is clear or obvious, and the error affected the party's substantial rights if it affected the outcome of the lower court proceedings. *Id.*

Wynnestone did not preserve this issue by raising it before the trial court. However, it is clear from the transcript that the trial court summarily ended the hearing. There is no indication that Stanley had even finished offering proofs before the trial court ruled on the amount of damages.

A defaulting party has a right to participate if proceedings are necessary to determine the amount of damages. *Wood*, 413 Mich at 5783-584. Defense counsel for Wynnestone appeared at the hearing and was available to participate. However, the trial court ended the hearing before Wynnestone was able to cross-examine the plaintiff or put on its own proofs regarding damages. While Wynnestone had defaulted on issues of liability, it was still entitled to participate in the damages proceedings. We conclude that the trial court clearly erred by denying it the opportunity to do so.

Further, this error affected Wynnestone's substantial rights. We do not conclude that the trial court was required to hold a separate hearing or give Wynnestone additional time to marshal its proofs, but given that the proceeding was entirely based on Stanley's testimony, had Wynnestone had the opportunity to cross-examine Stanley, this may have changed the results of the proceeding. We note that Wynnestone's affidavit of meritorious defenses included information that Stanley walked herself to the emergency room after the injury, which alone would provide some basis to impeach the severity of Stanley's injuries. We conclude that the trial court plainly erred when it denied Wynnestone the opportunity to participate in the damages portion of the default judgment hearing.

We affirm the trial court's decision not to set aside the default judgment, but reverse its determination of damages and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher